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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DWAINE MAURICE THOMPSON,

Defendant and Appellant.

D052279

(Super. Ct. No. SCD207980)

APPEAL from a judgment of the Superior Court of San Diego County, Janet I. Kintner, Judge. Affirmed.

A jury convicted Dwaine Maurice Thompson of possession of cocaine base. (Health & Saf. Code, § 11350, subd. (a).) In addition, the jury found true allegations Thompson had three prior prison convictions. (Pen. Code, § 667.5, subd. (b).) The trial court found one of the prior prison convictions also qualified as a prior strike conviction. (Pen. Code, § 667, subds. (b)-(i).) The trial court sentenced Thompson to seven years in prison, consisting of the middle term of two years for the possession of cocaine base

conviction, doubled for the prior strike conviction, plus three consecutive one-year terms for the prior prison convictions.

Thompson appeals, arguing the trial court abused its discretion by reversing its conditional order bifurcating the trial of the prior prison convictions allegations. In addition, Thompson argues the court erred by allowing the prosecution to impeach him with evidence he had a prior conviction for possession of cocaine base. Thompson also argues the court deprived him of his constitutional right to have all of the facts necessary to establish the truth of the prior prison conviction allegations proved to the jury beyond a reasonable doubt. We affirm the judgment.

I

Prosecution Evidence

While patrolling in the East Village area, San Diego Police Officer Taerance Oh saw a group of men huddled on the sidewalk. The men appeared to be looking at someone's hands. When Officer Oh approached in his patrol car, the group quickly broke up. Thompson put his hands in his pants pockets and walked away. Officer Oh did not see anyone in the huddled group put anything in Thompson's pockets before the group broke up.

Officer Oh got out of his patrol car, approached Thompson, and asked if he could talk to him. Thompson turned and walked towards Officer Oh. The officer asked Thompson to take his hands out of his pockets. When Thompson did so, Officer Oh saw white matter on Thompson's right hand, which the officer believed from his training and experience to be a controlled substance.

Officer Oh arrested and then searched Thompson. He found two bindles of a suspected controlled substance: one in Thompson's right front change pocket and one in his right front pants pocket. Officer Oh also found loose substances in Thompson's right front pants pocket. In addition, Thompson had a cell phone and \$251.

A criminalist determined one of the bindles contained 1.39 grams of cocaine base and the other bindle contained .5 grams of cocaine base. Officer Oh testified 1.39 grams is a usable amount.

When questioned about the cocaine base, Thompson told Officer Oh a white guy and white girl set him up and slipped the cocaine base in his pocket. When questioned about the substance on his right hand, Thompson said his hand was in his pocket. Lastly, when questioned about the money in his possession, Thompson said he had just been paid for working at Petco Park; however, he was unable to provide any details about where he worked.

Defense Evidence

Thompson, who represented himself, testified he was alone on the day of his arrest and had not been dealing drugs. In addition, he testified he only had a cell phone and some money he received from temporary work at Petco Park in his pockets. He claimed Officer Oh drove up in his patrol car and immediately arrested him. He also claimed Officer Oh started digging in his pockets trying to find the cocaine base and Thompson said to him, "This is a set up" and "I don't know what this is." He further claimed there was no debris on his right hand when he was arrested and suggested he picked it up in the patrol car when he was being transported to the police station.

II

A

Before trial, the court agreed to bifurcate the trial of the prior conviction allegations from the trial of the possession of cocaine base charge. However, the court informed Thompson if he chose to testify, it would allow the prosecutor to introduce evidence of his prior convictions for assault with a deadly weapon and selling cocaine base to impeach his credibility. The court also informed Thompson if he testified he did not know what cocaine base was, it would allow the prosecutor to introduce evidence of his prior conviction for possessing cocaine base.

Thompson testified on his own behalf and, as discussed in more detail in part II B, *post*, denied knowing what the substance found in his pockets was. He also denied having a prior conviction for assault with a deadly weapon and he claimed his prior conviction for selling cocaine base was based on fabricated documents and records. The court then permitted the prosecutor to introduce evidence of all three of Thompson's prior prison convictions and, consequently, determined a bifurcated trial on the prior prison conviction allegations was no longer necessary.

Thompson objected to a unitary trial, arguing the prior convictions were wrongful, they were not relevant to the pending charges, and evidence of them would unfairly undermine his credibility. He also objected to the admission of the prosecution's evidence of the prior convictions on the same grounds. However, Thompson did not

object to the contents of the prosecution's evidence or request any redactions.¹ In defense of the prior convictions allegations, Thompson testified the documents and records underlying them were fabricated and he had no recourse.

On appeal, Thompson contends the trial court abused its discretion by reversing its conditional order bifurcating the trial of the prior conviction allegations because conducting a unitary trial resulted in the jury receiving unduly prejudicial evidence. We conclude the trial court did not abuse its discretion under the circumstances.

"[A] trial court has the discretion, in a jury trial, to bifurcate the determination of the truth of an alleged prior conviction from the determination of the defendant's guilt of the charged offense, but is not required to do so if the defendant will not be unduly prejudiced by having the truth of the alleged prior conviction determined in a unitary trial." (*People v. Calderon* (1994) 9 Cal.4th 69, 72 (*Calderon*).) "Factors that affect the potential for prejudice include, but are not limited to, the degree to which the prior offense is similar to the charged offense [citations], how recently the prior conviction occurred, and the relative seriousness or inflammatory nature of the prior conviction as compared with the charged offense [citations]." (*Id.* at p. 79.)

"If it appears likely that admission of evidence of the prior conviction would unduly prejudice the defendant, the court should consider whether this potential for

¹ In fact, Thompson flatly refused to review the prosecution's evidence of the prior assault with a deadly weapon conviction, stating, "I don't need to look at any fabricating record." Although Thompson was shown the prosecution's evidence supporting the other prior conviction allegations, it is not clear from the record whether Thompson declined to review this evidence as well.

prejudice will be lessened for some reason" (*Calderon, supra*, 9 Cal.4th at p. 79.) "[T]he most common situation in which bifurcation of the determination of the truth of a prior conviction allegation is *not* required arises when, even if bifurcation were ordered, the jury still would learn of the existence of the prior conviction before returning a verdict of guilty." (*Id.* at p. 78; see also *People v. Burch* (2007) 148 Cal.App.4th 862, 867 (*Burch*).) This includes situations in which a defendant elects to testify and will be impeached with evidence of the prior conviction because, in such situations, a unitary trial does not generally expose the jury to any additional prejudicial information about the defendant. (*Calderon, supra*, at p. 78.) "However, even if the trial court's ruling was correct at the time it was made, reversal is required if the defendant shows the failure to bifurcate resulted in ' " 'gross unfairness' amounting to a denial of due process." ' [Citations.]" (*Burch, supra*, at pp. 866-867.)

This case clearly involves what *Calderon* refers as to the most common situation in which bifurcation is *not* required because Thompson's decision to testify and the substance of his testimony allowed the jury to learn of the existence of his prior convictions before the jury returned a guilty verdict on the possession charge. Accordingly, the trial court's decision to proceed with a unitary trial was correct when made and did not constitute an abuse of discretion.

Nonetheless, Thompson argues reversal is required under *Burch* because the prosecution's evidence supporting the prior conviction allegations contained inaccurate information, including that Thompson had multiple prior strike convictions, and extraneous information, including that Thompson had served time in prison, he was

charged with other serious crimes at the same time he was charged with assault with a deadly weapon, and he was on probation at the time he committed the assault with a deadly weapon. Thompson further complains the record does not show the trial court weighed the prejudicial effect of the prosecution's evidence under Evidence Code section 352 or made an effort to "sanitize" it. He contends the prejudice from the inaccurate and extraneous information is "evident and overwhelming" because the only information about his prior convictions that would have been admissible for impeachment purposes in a bifurcated trial is the name or type of crime and the date and place of conviction. We disagree.

A prosecutor may impeach a defendant based on a prior felony conviction either by examining the defendant or by introducing the record of the felony conviction. (Evid. Code, § 788.) In this case, the prosecutor chose the former method for the prior assault with a deadly weapon and sale of cocaine base convictions and, when examining Thompson about these convictions, the prosecutor appropriately limited his questions to the name or type of crime and the date and place of conviction. (*People v. Allen* (1986) 42 Cal.3d 1222, 1270.) The prosecutor did not seek to introduce records to prove the prior convictions until Thompson's testimony created the need for the prosecutor to do so. Therefore, Thompson has not established undue prejudice simply because the jury received information beyond the name or type of crime and the date and place of conviction.

As for Thompson's amalgamated contention that the unitary trial unduly prejudiced him because the trial court did not weigh the prejudicial effect of the prior

conviction evidence under Evidence Code section 352 or attempt to sanitize the evidence before admitting it, we conclude Thompson forfeited this contention because he did not specifically object to the prosecution's evidence under section 352 or ask the court to make any redactions. (Evid. Code, § 353; *People v. Partida* (2005) 37 Cal.4th 428, 433-434.) Thompson's repeated assertions that the evidence was irrelevant to the pending charges and harmful to his credibility are not sufficient to preserve an objection under Evidence Code section 352. (*People v. Anderson* (1990) 52 Cal.3d 453, 477-478, [The requirement to weigh evidence under section 352 is "triggered only if defendant either expressly invokes . . . section 352 as a ground for objection, or at least affirmatively argues that the risk of prejudice outweighs the relevance of the proffered evidence"], impliedly overruled on other grounds as recognized by *People v. Triplett* (1993) 16 Cal.App.4th 624, 628-629; *People v. Smith* (1984) 151 Cal.App.3d 89, 97 ["In the absence of an objection based on . . . section 352, or a specific request for the court to exercise the discretion granted it by that section, . . . the trial court was not required 'to make *sua sponte* an affirmative finding on the record to the effect that the probative value of the proffered evidence outweigh[ed] its prejudicial effect' "]; see also generally 1 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 3d. ed. 2008), § 22.10, pp. 363-364.)

Even if the trial court erred by failing to bifurcate the trial of the prior conviction allegations, the error does not require reversal. The court explained to the jury the limited purposes for which it could use the prior conviction evidence. The court also admonished the jury not to "consider this evidence as proof that the defendant committed

any of the crimes with which he is currently charged or for any other purpose." (See CALCRIM No. 3100.) Because the record does not show there is a reasonable probability the jury failed to follow the court's instruction, we conclude any error in failing to bifurcate the trial was harmless. (*Burch, supra*, 148 Cal.App.4th at pp. 868-869.)

B

As explained in part II A, *ante*, during the pretrial bifurcation discussion, the trial court informed Thompson if he testified he did not know what cocaine base is, it would allow the prosecutor to introduce evidence of his prior conviction for possessing cocaine base. In a subsequent discussion outside the jury's presence about how to present the cocaine base evidence, Thompson told the trial court he wanted the court and the jury to understand he "didn't have no knowledge what the narcotic was." The court reminded him if he said anything like that when he testified, it would open the door for the prosecutor to introduce evidence of his prior conviction for possessing cocaine base. Thompson indicated he intended to argue the point "no matter what."

Thompson's direct testimony consisted of a disjointed narrative. Regarding the cocaine base, he testified, "As far as what was on me was just the money and the phone. When he started digging in my pockets with the stuff that Officer Oh is trying to plant it on me. I don't know what this is?"

The prosecutor interpreted Thompson's testimony as denying knowledge of what cocaine base is and, therefore, sought to admit evidence of Thompson's prior conviction for possessing cocaine base to prove Thompson's knowledge. The court explained to

Thompson, "[The prosecutor] is saying that he wants to admit [the prior possession conviction] to show what is rock cocaine." To which the prosecutor added, "He opened the door. He said he didn't know what was on him. He didn't know what it was."

Thompson responded, "That is what I said. This is what I meant."

Later, as part of the same discussion, the trial court and Thompson engaged in the following exchange:

"THE COURT: . . . I know you said you didn't know that this was rock cocaine. I take it that is what you testified to. Is that what you testified to that you didn't know it was rock cocaine?

"MR. THOMPSON: Today?

"THE COURT: Right.

"MR. THOMPSON: In this trial?

"THE COURT: Yes. Is that what you said?

"MR. THOMPSON: Yes, I told him."

After more discussion, the court informed Thompson it was going to allow the prosecutor to introduce evidence of the prior possession of cocaine base conviction because Thompson denied knowing what cocaine base is. Although Thompson continued to object to the admission of the evidence because of its potential harm to his credibility, he never argued or otherwise indicated the court had misunderstood his testimony.

Nonetheless, on appeal Thompson contends the trial court's interpretation of his testimony was incorrect. He claims he never denied knowing the substance found by

Officer Oh was cocaine base. He only denied possessing it. Consequently, he contends the court abused its discretion in admitting the prior possession of cocaine base conviction. Thompson also contends the court abused its discretion in admitting evidence of this conviction because the court did not first consider whether the evidence was more prejudicial than probative under Evidence Code section 352.

Regarding Thompson's first contention, we review the trial court's findings for substantial evidence. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711.) Such deferential review is particularly appropriate here because of Thompson's irregular speech patterns and the trial court's ability to observe and consider his facial expressions, body language, hand gestures, and other visual and auditory clues to the meaning of his words. We conclude there is substantial evidence to support the trial court's finding based on Thompson's words and their context, his exchanges with the court about what he intended to convey to the jury and what he meant by his testimony, and his failure to correct the court's interpretation of his testimony when he had the opportunity.

Regarding Thompson's second contention, as we previously explained, he forfeited this contention because he never specifically objected to admission of the prior conviction evidence under Evidence Code section 352. (Evid. Code, § 353; *People v. Partida, supra*, 37 Cal.4th at pp. 433-434; *People v. Anderson, supra*, 52 Cal.3d at p. 477; *People v. Smith, supra*, 151 Cal.App.3d at p. 97.)

Even if the trial court erred by admitting evidence of the prior possession of cocaine base conviction, we conclude the error was harmless. As we also previously explained, the court instructed the jury on the limited purposes for which it could use this

evidence and admonished the jury not to use it as proof of Thompson's guilt in the current case. Since the record does not show there is a reasonable probability the jury failed to follow the trial court's instruction, Thompson has not established the admission of this evidence resulted in a miscarriage of justice. (See *People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

C

Finally, Thompson contends he was deprived of his constitutional right, as articulated in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), to have all of the facts necessary to establish the truth of the prior prison conviction allegations proved to the jury beyond a reasonable doubt. More particularly, he contends the jury was only permitted to determine whether he had the prior convictions and not whether he had served qualifying prison terms. We find no merit to this contention.

In *People v. Thomas* (2001) 91 Cal.App.4th 212, the Second District Court of Appeal held that a defendant has no constitutional right to a jury trial on prior prison conviction allegations. (*Id.* at pp. 222-223.) The California Supreme Court has cited this holding with approval in three cases, all of which it decided after *Apprendi* and two of which it decided after *Cunningham*. (See *People v. Towne* (2008) 44 Cal.4th 63, 79-80; *People v. Black* (2007) 41 Cal.4th 799, 819; *People v. McGee* (2006) 38 Cal.4th 682,

700-701.) The Supreme Court's approval of this holding is binding on us. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

O'ROURKE, J.